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No. 90-513

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN MUSACCHIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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15

QUESTIONS PRESENTED

1. Whether, under 26 U.S.C. 6531, the statute of limitations applicable to a prosecution for aiding and abetting tax evasion, in violation of 26 U.S.C. 7201, is six years.

2. Whether this Court's decision in *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), requires reversal of petitioner's conviction even though he did not object to the magistrate's conducting the jury selection in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 900 F.2d 493. The opinion of the district court is reported at 696 F. Supp. 1548.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1990, and a petition for rehearing was denied on May 24, 1990. Pet. App. 29a-30a. On August 15, 1990, Justice Marshall extended the time for filing a petition for a writ of certiorari to September 21, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of willfully aiding and abetting attempts to evade and defeat the federal excise tax on gasoline, in violation of 26 U.S.C. 7201 (Counts 2, 4, 6); willfully aiding and abetting failures truthfully to account for and pay over to the Internal Revenue Service (IRS) federal excise taxes on gasoline, in violation of 26 U.S.C. 7202 (Counts 3, 5, 7); and conspiracy to commit the foregoing offenses, to defraud the United States, and to violate 26 U.S.C. 7206(2) (willful aiding and assisting in the preparation and presentation of false or fraudulent excise tax returns), in violation of 18 U.S.C. 371. Tr. 806-807.[1] Petitioner was sentenced to concurrent three-year terms of imprisonment on each count and fined a total of $70,000.

1. Petitioner owned and operated OK Petroleum, a corporation engaged in the business of buying and selling gasoline through retail and wholesale outlets in the State of New York. During the period at issue, federal law imposed an excise tax of nine cents per gallon on gasoline sold by "producers" of gasoline, a category that included certain wholesale gasoline distributors. The tax, however, was not applicable to a sale in which both the seller and buyer held a valid Registration for Tax-Free Transactions (IRS Form 637). Tr. 120-121, 667-668. The first registered seller who sold to a non-registered customer was responsible for paying the tax to the IRS. However, a seller who relied in good faith on a certification by a buyer that the

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[1] A co-defendant, Joseph Gambino, was charged with the same offenses in five counts of the indictment. He was tried with petitioner and was convicted only on the conspiracy count. Tr. 806-807. As discussed below (see page 6, *infra*), the court of appeals has remanded the case for a new trial on the conspiracy count.

latter held a valid Form 647, and who sold to the buyer on a tax-free basis, was not liable for payment of the tax; in that event, the buyer became liable. Tr. 667-668, 683. In December 1982 and January 1983, OK applied for an IRS Form 637 permitting it to engage in tax-free transactions, but it never obtained one. Pet. App. 3a-4a.

During the first three quarters of 1983, OK made purchases of gasoline from General Oil Distributors, Inc., on which the excise taxes were not paid. The sales were made pursuant to representations by petitioner that OK held a valid Form 637. OK's untaxed purchases during the third quarter of 1983 were the subject of Counts 6 and 7 of the indictment. Those purchases amounted to more than 3,000,000 gallons, on which OK's tax liability totalled more than $270,000. Upon learning that OK did not hold a valid Form 637, General Oil Distributors discontinued untaxed sales of gasoline to OK. Pet. App. 4a; Tr. 157-168, 415, 599, 666-669.

Petitioner then devised a "daisy chain scheme" to buy gasoline on which the excise tax was not paid. Under the scheme, gasoline was delivered by a number of different suppliers to one of two companies (AKA Petroleum or CWM Petroleum) that petitioner controlled. The gasoline was initially purchased from the suppliers by Rappaport Fuel Co., which held a Form 637. Rappaport then issued invoices for fictitious tax-free sales of the gasoline to other companies, not controlled by petitioner or his co-defendant, that operated for the specific purpose of evading excise taxes. Those companies, which also held Forms 637, operated for a short period of time to allow firms to document fictitious sales of untaxed gasoline to them, and then went out of existence, leaving large amounts of taxes unpaid. In most instances, AKA or CWM paid the distributors for the gasoline purchased by Rappaport. By means of this scheme, petitioner purchased

more than 8,000,000 gallons of gasoline, on which neither he nor Rappaport paid the excise taxes due in the amount of more than $770,000. Pet. App. 4a.

2. a. On appeal, petitioner initially contended that his conviction on the substantive counts was barred by the statute of limitations because the indictment was filed more than three years after the last act relating to those counts.[2] Petitioner argued that committing the substantive offenses of attempted tax evasion and willful failure to pay a tax by means of aiding and abetting is subject to the general three-year limitations period in 26 U.S.C. 6531 for criminal tax offenses, rather than the six-year limitations period applicable to the substantive offenses of tax evasion and failure to pay a tax, see 26 U.S.C. 6531(2) and (4).

Petitioner's position was based on the fact that another exception to the general three-year limitations period, contained in Subsection (3) of 26 U.S.C. 6531, expressly provides a six-year limitations period for the offense of willfully "aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation" of a false or fraudulent tax return or document. Pet. App. 11a-12a. Petitioner contended that the reference to "aiding or assisting" under that provison refers to aiding or abetting under 18 U.S.C. 2, and that by application of the maxim *expressio unius est exclusio alterius*, the failure to mention "aiding or assisting" in connection with the offenses of tax evasion and failure to pay a tax mentioned in Subsections (2) and (4) of 26 U.S.C. 6531 means that the six-year limitations period under those provisions is inapplicable to one

[2] Petitioner also argued that the government had improperly bolstered the credibility of certain witnesses by questioning them about provisions of cooperation agreements requiring the witnesses to testify truthfully. The court of appeals rejected that claim, Pet. App. 5a-6a, and petitioner does not renew it in this Court.

who commits either of those offenses by aiding or abetting. The court of appeals rejected petitioner's argument.[3] Following *United States* v. *Campbell*, 426 F.2d 547, 553 (2d Cir. 1970), the court held that the limitations period applicable to the commission of an offense by aiding or abetting is the period applicable to the substantive offense charged. Pet. App. 11a-16a.

b. After this case had been briefed and argued in the court of appeals, this Court decided *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), which held that a magistrate may not, over the defendant's objection, conduct jury selection in a felony prosecution. Because the jury in this case had been selected by a magistrate, petitioner asked the court of appeals to withhold its decision until he filed a supplemental brief on the question whether *Gomez* required reversal of his conviction. Following the filing of supplemental briefs, the court held that reversal was not required because petitioner had failed to object to that procedure. Pet. App. 16a-22a.

c. On July 18, 1990, the government filed a motion in the court of appeals for partial remand to permit the district court to vacate petitioner's convictions and sentences on Counts 3, 5 and 7, which charged aiding and abetting willful failures to account truthfully for and pay over excise taxes on gasoline. The government informed the court that it had recently become convinced that 26 U.S.C. 7202 does not apply to the gasoline excise taxes at issue in this case. Petitioner and his co-defendant then filed motions to remand the case to the district court to consider whether their convictions on the conspiracy count should be vacated as well. On September 14, 1990, the

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[3] The district court had also rejected petitioner's argument in denying his motion to dismiss the indictment on statute of limitations grounds. *United States* v. *Musacchia*, 696 F. Supp. 1548 (E.D.N.Y. 1988).

court of appeals remanded the case to the district court to vacate petitioner's convictions under 26 U.S.C. 7202 and for a new trial on the conspiracy count, because it could not "determine whether the conspiracy conviction was based properly on a violation of § 7201 or, as now appears, improperly on § 7202." The court of appeals did not disturb the convictions at issue here—those on the three counts of aiding and abetting willful attempts to evade and defeat the excise tax on gasoline, in violation of 26 U.S.C. 7201.

ARGUMENT

1. Petitioner contends (Pet. 4-6) that his convictions for aiding and abetting evasion of the gasoline excise tax were barred by the statute of limitations.

The periods of limitation for instituting criminal prosecutions under the criminal tax laws are set forth in 26 U.S.C. 6531, which provides in relevant part:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency therefore, whether by conspiracy or not, and in any manner;
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
>
> (3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in

connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) for the offense of willfully failing to pay any tax, or make any return * * *, at the time or times required by law or regulations;

* * * * *

(8) for offenses arising under Section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

* * * * *

The indictment in this case was returned within six years of the completion of the offenses, but not within three years. Petitioner contends that the period of limitations applicable to aiding and abetting attempted tax evasion is the three-year period provided for tax offenses generally, rather than the six-year period provided by Subsection (2) of Section 6531 for the offense of attempted tax evasion. He bases that claim on the specific provision in Subsection (3) for the offense of "willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation" of a false tax document. 26 U.S.C. 6531(3). In his view (Pet. 4), because "this is the only offense for which aiding and abetting carries its own Statute of Limitations," under the maxim *expressio unius est exclusio alterius*, "the failure to mention aiding and abetting any other offense must be construed as Congress' expression of intent to exclude aiding and abetting any other offense

from those with six-year limitation periods." The court of appeals correctly rejected that argument. Pet. App. 11a-16a.

By its terms, Section 6531 prescribes limitations periods for various "offenses." It is well settled that aiding and abetting is not an independent offense. See *United States* v. *Kegler*, 724 F.2d 190, 200-201 (D.C. Cir. 1984); *United States* v. *Campbell*, 426 F.2d 547, 553 (2d Cir. 1970). Under 18 U.S.C. 2, an aider or abettor is a principal in the commission of a substantive offense and is guilty of committing that offense. See *Standefer* v. *United States*, 447 U.S. 10, 20 (1980); *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-619 (1949); *United States* v. *Johnson*, 319 U.S. 503, 514 (1943). It is not even necessary to charge an aider or abettor in that capacity; one charged with committing an offense may be convicted on evidence that he merely aided and abetted. See, *e.g.*, *Jin Fuey Moy* v. *United States*, 254 U.S. 189 (1920) (physician charged with sale of narcotic drugs properly convicted on evidence that he aided an unlawful sale by a druggist); *United States* v. *Kegler*, 724 F.2d at 201; *United States* v. *Frye*, 548 F.2d 765, 767 n.4 (8th Cir. 1977). Thus, one who aids and abets attempted tax evasion is guilty of that offense, *United States* v. *Johnson*, 319 U.S. at 514-515, and the appropriate limitations period is the period prescribed for that offense. See *United States* v. *Campbell*, 426 F.2d at 553.

There is no basis for assuming, as petitioner does, that in legislating with regard to "offenses" in 26 U.S.C. 6531, Congress intended to prescribe a period of limitations specifically for tax prosecutions brought in reliance on 18 U.S.C. 2. This point is confirmed by a close examination of the language of Subsection (3), upon which petitioner relies. Its language tracks, almost verbatim, that of 26 U.S.C. 7206(2), which defines the substantive offense of

"aiding or assisting" in the preparation or presentation of a false or fraudulent tax return or other document.[4] Although Subsection (3) does not mention Section 7206(2) by section number, it could not be clearer, in light of the virtually identical language of the two sections, that Section 6531(3) refers to the offense described by Section 7206(2).[5] This obvious reference to an offense described in full in Title 26 refutes the notion that Subsection (3) was specifically intended to refer to the commission of an offense by means of aiding or abetting that is made criminal only by the generally applicable provisions of 18 U.S.C. 2.

A fortiori, Congress's use of the unique terminology of Section 7206(2) ("aiding or assisting") in Subsection (3) alone does not suggest that Congress intended implicitly to address the commission of the criminal tax offenses men-

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[4] Section 7206(2) provides that any person who "[w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, or a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowlege or consent of the person authorized or required to present such return, affidavit, claim, or document," shall be guilty of a felony.

[5] The exceptions in Subsections (1), (2), and (3) of Section 6531 to the three-year limitations period all existed under the Internal Revenue Code of 1939. See 26 U.S.C. 3748 (1952 ed.). None of those provisions referred to other Code sections by number. The succeeding Subsections in Section 6531 that now cite specific sections of the Internal Revenue Code containing substantive offenses were added when the 1954 Code was enacted. Given this difference between the older and the newer subsections of Section 6531, the cross-references to specific Code sections in the newer subsections in no way undermines the conclusion that Subsection (3) refers to the substantive offense in Section 7206(2) of "aiding or assisting" in the preparation of false returns, even though it does not cite to that Section's numerical designation in the Code.

tioned in the other subsections of Section 6531 by means of aiding and abetting under 18 U.S.C. 2. There is therefore no reason to disregard the usual rule that the statute of limitations for an offense is the same regardless of whether the defendant is charged as a traditional principal or as an aider or abettor.

Contrary to petitioner's assertion (Pet. 5), there is no conflict between the decision in this case and decisions holding that the statute of limitations for tax offenses governs prosecutions under 18 U.S.C. 371 for conspiracy to violate the tax laws. The courts below applied the statute of limitations applicable to tax offenses, 26 U.S.C. 6531, not the statute of limitations applicable to criminal prosecutions generally, 18 U.S.C. 3282. It was appropriate for the court of appeals to look to general principles of criminal law regarding aiding and abetting, embodied in 18 U.S.C. 2, to determine whether Congress intended, by enacting Subsection (3) of 26 U.S.C. 6531, to treat aiding and abetting as an independent offense for statute of limitations purposes under Title 26. In determining the meaning of a statutory provision, a court may take into consideration the framework in which it exists. See *Crandon* v. *United States*, 110 S. Ct. 997, 1001 (1990); *FBI* v. *Abramson*, 456 U.S. 615, 625 (1982); *Mrvica* v. *Esperdy*, 317 F.2d 220, 222 (2d Cir. 1963), aff'd, 376 U.S. 560 (1964). Principles regarding the aiding and abetting statute are part of the framework in which the criminal tax laws exist. See *United States* v. *Johnson*, 319 U.S. at 314-315. Nothing in Section 6531 or any other provision of the Internal Revenue Code suggests that Congress intended to depart from those principles when it enacted the criminal tax laws.

2. Petitioner also contends (Pet. 6-7) that the court of appeals erred in holding that this Court's decision in *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), does not

require reversal of his convictions because he did not object to a magistrate's conducting jury selection. The same issue is presented in *United States* v. *France*, cert. granted, 110 S. Ct. 1921 (1990) (argued Oct. 2, 1990). We therefore suggest that the Court hold the petition in this case and dispose of it as appropriate in light of the decision in *France*.

CONCLUSION

The petition for a writ of certiorari should be held with respect to the second question presented and then disposed of as appropriate in light of this Court's disposition of *United States* v. *France*, cert. granted, 110 S. Ct. 1921 (1990) (argued Oct. 2, 1990). In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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